

ALOR JANGGUS SOON SENG TRADING SDN BHD & ORS

a

v.

SEY HOE SDN BHD & ORS

COURT OF APPEAL, KUALA LUMPUR

b

SITI NORMA YAAKOB JCA

DENIS ONG JCA

HAIDAR MOHD NOOR JCA

[CIVIL APPEAL NO: P-02-34-97]

7 NOVEMBER 1999

c

CIVIL PROCEDURE: *Appeal - Record of Appeal - Draft order filed in record of appeal - Whether defective - Non-compliance with Rules of the Court of Appeal 1994, O. 18 r. 4(d) - Disagreement with other party's solicitors being used as excuse for not extracting sealed order*

d

CIVIL PROCEDURE: *Appeal - Chronology of events - Whether must be submitted to Registrar of Court of Appeal - Rules of the Court of Appeal 1994, O. 18 r. 10 - Exceptionally good grounds for non-compliance for which the court may exercise its discretion*

The plaintiffs ('appellants') commenced an action against the defendants ('respondents') seeking various prayers, *inter alia*, an order to nullify the sale of 682,500 shares of MGR Corporation Sdn Bhd by the 1st respondent to the 3rd respondent *vide* a shares sale agreement on the basis that the same was invalid and was an attempt to defraud the shareholders. After a full hearing, the learned judge dismissed the suit and the appellants appealed. At the hearing, counsel for the appellants requested an adjournment and raised several issues which were strenuously objected to by the respondents. Counsel for the 1st respondent then raised his preliminary objections, which were: (i) only the draft order was in the appeal record and not the sealed order, and (ii) no chronology of events was submitted to the registrar of the Court of Appeal. The court decided to determine the issues raised in the preliminary objections before deciding the application for an adjournment.

e

f

g

Held:

Per Haidar Mohd Noor JCA

h

[1] As only the draft order was filed in the appeal record and not the sealed order, the appeal was not properly before the court and was therefore defective for non-compliance with O. 18 r. 4(d) of the Rules of the Court of Appeal 1994 ('RCA') which provides that a copy of the judgment, decree or order appealed from shall form part of the appeal record.

i

- a* [2] As it was incumbent upon the appellants' solicitors to prepare the appeal record, it was also incumbent upon them to take the necessary steps as prescribed by O. 42 r. 8(3) & (4) of the Rules of the High Court 1980 and not use the disagreement of the solicitors for the 3rd respondent as an excuse for not extracting the sealed order.
- b* [3] Order 18 r. 10 of the RCA certainly requires that the chronology of events be submitted to the registrar, which the appellants' counsel admitted they failed to do. The court must emphasise that rules are made to be obeyed by all parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion.
- c*

[Preliminary objection upheld; appeal dismissed.]

[Bahasa Malaysia Translation Of Headnotes]

- d* Pihak plaintiff-plaintiff ('perayu') telah memulakan tindakan terhadap pihak defendan-defendan ('responden') memohon berbagai permohonan, *inter alia*, satu perintah pembatalan penjualan 682,500 saham-saham MGR Corporation Sdn Bhd oleh responden pertama kepada respondent ketiga melalui satu perjanjian jualbeli saham berdasarkan penjualan tersebut adalah tidak sah dan merupakan satu percubaan untuk menipu pemegang-pemegang saham.
- e* Selepas perbincangan penuh, hakim yang bijaksana telah membuang kes tersebut dengan kos, di mana pihak perayu telah membuat rayuan. Pada hari perbincangan rayuan, peguam pihak perayu telah memohon untuk satu penangguhan dan mengemukakan beberapa isu yang mana dibantah kuat oleh peguam responden pertama. Seterusnya, peguam responden pertama
- f* mengemukakan bantahan permulaan, iaitu (1) bahawa hanya deraf perintah dan bukan perintah yang dimeterai yang telah dimasukkan di dalam rekod rayuan, dan (2) kronologi bagi kes tersebut tidak diberikan kepada pendaftar Mahkamah Rayuan. Mahkamah mengambil keputusan untuk memutuskan isu-isu yang dikemukakan dalam bantahan permulaan sebelum
- g* mempertimbangkan permohonan penangguhan.

Diputuskan:

Oleh Haidar Mohd Noor HMR

- h* [1] Memandangkan hanya deraf perintah sahaja dan bukan perintah yang telah dimeterai yang telah difailkan dalam rekod rayuan, rayuan ini adalah tidak sempurna di mahkamah ini dan dianggap sebagai satu kecacatan kerana gagal mematuhi K. 18 A. 4(d) Kaedah-Kaedah Mahkamah Rayuan 1994 yang memperuntukkan bahawa salinan keputusan, dekri dan perintah yang dirayu hendaklah dijadikan sebagai
- i* sebahagian dari rekod rayuan.

[2] Sebagaimana menjadi tugas peguam perayu untuk menyediakan rekod rayuan begitu juga adalah tugas mereka untuk mengambil tindakan yang sewajarnya seperti yang diperuntukkan di bawah K. 42 A. 8(3) & (4) Kaedah-Kaedah Mahkamah Tinggi 1980, dan mereka tidak boleh mengatakan bahawa tiada persetujuan yang dapat dicapai dengan peguam responden ketiga sebagai alasan untuk tidak mendapatkan perintah yang telah dimeterai. a
b

[3] Kaedah 18 A. 10 Kaedah-Kaedah Mahkamah Rayuan 1994 memang mensyaratkan bahawa kronologi kes tersebut diberikan kepada pendaftar di mana peguam perayu telah mengaku gagal untuk berbuat demikian. Mahkamah ingin menekankan bahawa aturan adalah dibuat untuk dipatuhi oleh kesemua pihak kecuali terdapat alasan berkecuali yang sah untuk kitadakpatuhan tersebut mengikut budi bicara mahkamah. c

[Bantahan awal dibenarkan; rayuan ditolak.]

Case(s) referred to:

Ahmed Abdul Rahman v. SPK Sentosa Corp Bhd & Anor [1998] 4 CLJ 269 (foll)
Alloy Automotive Sdn Bhd v. Enkei Automotive Co Ltd & Anor [1997] 2 CLJ 392 (foll)

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 (foll)

Sykt Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ 729 (refd)

Tan Siew Peng v. OCBC Bank (M) Bhd [1998] 2 CLJ 684 (refd)

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(a)
Rules of the Court of Appeal 1994, O. 18 rr. 4(d), 7, 10
Rules of the High Court 1980, O. 19 r. 3, O. 42 r. 8(3), (4)

Other source(s) referred to:

Practice Direction No 1 of 1992 (Supreme Court)
Practice Direction No 5 of 1995 (Court of Appeal)

For the appellants - R Thayalan (YS Leong with him); M/s Low Hop Bing, Koh Kong & Assoc

For the 1st respondent - Tan Lip Gay; M/s Leong, Ng & Tan

For the 2nd respondent - Ghazi Ishak (Ong Kheng Leng with him); M/s Ghazi & Lim

For the 3rd respondent - RJ Manecksha (Surinder Singh with him); M/s Ong & Manecksha

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-109-93]

Reported by Farah Naim

d

e

f

g

h

i

*a***JUDGMENT****Haidar Mohd Noor JCA:**

b The suit, the subject of the appeal before us, is in respect of an action by the plaintiffs against the defendants seeking, *inter alia*, for an order to nullify the sale of 682,500 shares of MGR Corporation Sdn. Bhd. to the third defendant, by the first defendant *vide* shares sales agreement dated 1 September 1992. The first defendant was represented by its managing director, the second defendant. The plaintiffs alleged, *inter alia*, that the agreement dated 1 September 1992 is not valid and is an attempt to defraud the shareholders and the particulars are set out in para. 14 of the amended statement of claim. Various prayers including an injunction are sought by the plaintiffs in para. 20 of the amended statement of claim.

d The directors of the first defendant resolved to acquire 682,500 shares of MGR Corporation Sdn. Bhd. (which subsequently went public) on 8 January 1992 from one Loi Lung Kiong. The acquisition was approved by MGR Corporation Sdn. Bhd. on 10 January 1992.

e The first plaintiff is a family company. The second to seventh plaintiffs are brothers, all by the same father. The fifth and the seventh plaintiffs are from the same mother, the others from another mother. The first defendant is a family company started by two brothers, the father of the second to the seventh plaintiffs and the father of the second defendant. So, the second defendant is a cousin of the second to the seventh plaintiffs. The third defendant who is not related to any of the parties, is the purchaser of 682,500 shares of MGR Corporation Sdn. Bhd. (formerly known as MGR Timber Marketing Sdn. Bhd.) from the first defendant. The plaintiffs are shareholders (totaling 43.5%) of the first defendant. The second defendant has about 25.6% shares in the first defendant.

f After a full hearing, the learned judge dismissed the suit with costs. The plaintiffs (appellants) appealed.

g When the appeal came for hearing before us, counsel for the appellants applied for an adjournment on the ground that the second appellant is a bankrupt. He informed us that he could not proceed without the sanction of the official assignee citing s. 38(1)(a) of the Bankruptcy Act 1967. He could not tell us when the second appellant was made a bankrupt. However, he said that he was advised of the second appellant's position in early October this year and wrote to the official assignee for the sanction. The official assignee advised that he needed time to consider and counsel produced a letter from the official assignee to that effect. At the same time counsel also informed us that the third appellant may have been declared a bankrupt as well and he needed time to check on this.

Quite apart from the bankruptcy issue, counsel also informed us that he was advised by the second and the third appellants that Mr. Tan Lip Gay acted for them in the Alor Setar High Court suit and there could possibly be a conflict of interest. Mr. Tan Lip Gay of M/s Leong & Co., had served on counsel for the appellants a notice of change of solicitors. Counsel for the appellants said that he needed time to verify on this conflict of interest issue as well.

In reply, Mr. Tan Lip Gay, counsel for the first respondent admitted that he did act for the second and third appellants in the Alor Setar High Court suit as intimated by counsel for the appellants. However, according to Mr. Tan Lip Gay, the Alor Setar High Court suit has no relevance to the present case – it was a banking matter and had been disposed of by the Federal Court.

We regret to note that the counsel for the appellants has not been candid in that he did not disclose to us that he had earlier written a letter to the learned president of the Court of Appeal seeking for adjournment of this appeal on the ground of the bankruptcy of the second appellant. Dato' Ghazi Ishak, counsel for the second respondent, informed us of the application of the appellants to the learned president as it was objected to by the respondents on the grounds:

- (1) the appeal was fixed at the behest of the appellants;
- (2) common solicitors act for all the appellants;
- (3) the decision appealed against was made on 31 January 1997.

Dato' Ghazi Ishak also informed us that the appellants' application for an adjournment was rejected by the learned president by letter dated 4 November 1999.

Under these circumstances, the application for adjournment before us was strenuously objected to by the respondents.

In the course of arguments, it appears that the appellants did not include a sealed copy of the order of the High Court in the appeal record and counsel for the appellants indicated that he needed time to do so. Hence the reason for the adjournment quite apart from the other grounds stated earlier on. Obviously, counsel for the appellants became aware of the omission of the sealed order of the High Court when counsel for the first respondent gave notice that the first respondent would raise the omission by way of a preliminary objection at the hearing of this appeal.

- a* We then decided to hear the preliminary objection as the success of such an objection would determine the appeal. In the event the objection failed, we would then give due consideration to the application for adjournment.

Counsel for the first respondent relied on two grounds in his preliminary objection. They are:

- b*
- (1) only the draft order was in the appeal record but not the sealed order.
 - (2) no chronology of events has been submitted to the registrar of the Court of Appeal.

- c* ***(1) Only The Draft Order Is In The Appeal Record But Not The Sealed Order***

This ground was conceded by counsel for the appellants.

- d* Counsel for the first respondent submitted that as only the draft order was filed in the appeal record but not the sealed order, the appeal was not properly before us and was therefore defective for non-compliance with O. 18 r. 4(d) of the Rules of the Court of Appeal 1994 (“RCA”) which provides that a copy of the judgment, decree or order appealed from shall form part of the appeal record. (see O. 18 r. 7 of RCA.)

- e* The then Supreme Court in *Hasil Bumi Perumahan Sdn Bhd & Ors. v. United Malayan Banking Corp. Bhd* [1994] 1 CLJ 329; [1994] 1 MLJ 312 in construing a fair copy of the judgment and a draft judgment held that the fair copy of the judgment should be presented for entry in compliance with all the requirements of the Rules of the High Court 1980 (“RHC”). A draft judgment is not a judgment since a draft implies that it needs perfection and approval. No doubt in *Hasil Bumi*, it was a claim under O. 19 r. 3 of the RHC, but nonetheless, we would respectfully take the same approach in construing the word “order” in O. 18 r. 4(d) of RCA. In other words, the order to be included in the appeal record must be a sealed order and not a draft order.
- f*
- g*

Counsel for the appellants relying on the judgment of this court in *Tan Siew Peng v. OCBC Bank (M) Bhd* [1998] 2 CLJ 684; [1998] 2 MLJ 420 submitted that as the sealed order was not available, the appellants may later include it in a supplementary record. The judgment of this court, though *obiter*, would appear to be in consonance with the Practice Direction No. 1/92 of the Supreme Court which was adopted by the Court of Appeal with certain modifications *vide* its Practice Direction No. 1 of 1995. However, we ask why no supplementary record was filed by the appellants? According to counsel for the appellants, the draft order was approved by them and returned to Messrs. Ong & Manecksha who prepared it in the

h

i

first place. After that nothing was heard from Messrs. Ong & Manecksha. In rebuttal, Mr. Manecksha, counsel for the third respondent, disclaimed receipt of the approved order from the appellants' solicitors. In our view the solicitors for the appellants should not have left the matter so. It is open to them to invoke the provisions of O. 42 r. 8(3) and (4) of the RHC which read:

8(1) ...

(2) ...

(3) In any case where the solicitors concerned are unable to agree upon the draft, any one of them may obtain an appointment before the Registrar, of which notice shall be given to the other, to settle the terms of the judgment or order.

(4) Every judgment or order shall be settled by the Registrar, but in the case of a judgment or order made by a Judge, any party may require the matter in dispute to be referred to the Judge for his determination.

As it is incumbent upon the appellants' solicitors to prepare the appeal record it is also incumbent upon them to take the necessary steps as prescribed by O. 42 r. 8(3) and (4) of the RHC and not used the disagreement of the solicitors for the third respondent as an excuse for not extracting the sealed order.

(2) No Chronology Of Events Submitted To The Registrar Of The Court Of Appeal

Counsel for the first respondent referred us to O. 18 r. 10 of RCA which reads:

(10) The appellant shall, when filing his record of appeal in the Registry, submit to the Registrar a chronology of events from the date the action or the application was filed in the High Court to the date of filing of the record of appeal in the Registry.

He submitted that the failure by the appellants to comply with O. 18 r. 10 of RCA would mean that the appeal record is also defective, and cited *Ahmed Abdul Rahman v. SPK Sentosa Corp. Bhd & Anor* [1998] 4 CLJ 269 as authority.

Counsel for the appellants admitted that they have not submitted the chronology of events to the registrar. However, they contended that they were not required to serve the chronology of events on the respondents' solicitors. That might well be so but O. 18 r. 10 of RCA certainly requires that the chronology of events be submitted to the registrar for which they admittedly failed to do so.

- a* This court in *Ahmed's* case had the occasion to consider, *inter alia*, a breach of O. 18 r. 10 of RCA as well. In stressing the duties of solicitors to be vigilant at all times due regard must also be given to the rules thereby confirming an earlier judgment of this court in *Alloy Automotive Sdn. Bhd v. Enkei Automotive Co. Ltd & Anor* [1997] 3 MLJ 205 by the following passage at p. 209, of the report:

- b* This court viewed that there was a blatant disregard by the appellant's solicitors of the court's procedure. It is also the view of this court that to a certain extent, the appellant could not escape and was partly to share for the delay in the filing of the appeal record. The appellant, we feel, should have been more vigilant and alert as to the state of its pending matter. We feel the appellant should have the attentiveness to check on the action of the solicitors it employed and paid for. If the case was delayed, the appellant should have pursued the matter as a diligent litigant and even to the extent of firing its solicitors and changing to a new solicitor who could do a better job. After all, it was paying and had the right to call the tune.
- c* The appellant was the master and the solicitors were only its agent. We could not subscribe and sympathize with the appellant's counsel's submission that his client presumed everything was in order until the letter from the Court of Appeal dated 29 June 1995.

- d* In spite of the strong caution in *Alloy Automotive's* case, it seems to us that solicitors generally take an indolent attitude in seeing to the compliance of the rules. We must emphasise that rules are made to be obeyed by all the parties unless they have exceptionally good grounds for non-compliance for which the court may exercise its discretion. We would reiterate what Eusoff Chin, SCJ (as he then was) in the Supreme Court case of *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn. Bhd* [1994] 2 MLJ 420 at p. 423, said:

- e* Further, it has been held by the courts that rules of court are to be obeyed. Failure to comply with them lead to chaos in the conduct of litigation. See *Lee Guat Eng v. Tan Lian Kim* [1985] 2 MLJ 196, and *Ratnam v. Cumarasamy & Anor* [1964] 3 All ER 933; [1965] 1 WLR 8.

f Counsel for the second and the third respondents adopted the argument of counsel for the first respondent.

- g* In the circumstances, we agreed with the submission of counsel for the respondents and upheld the preliminary objection. There were no exceptional or good grounds for us to exercise our discretion. The appellants and their solicitors are to be blamed for the situation they put themselves in. We regrettably have no alternative, though it may be harsh, but to dismiss the appeal with costs on the ground that the appeal was not properly before us. We ordered the deposit to be paid to the respondents to account of their taxed costs.
- h*
- i*